

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

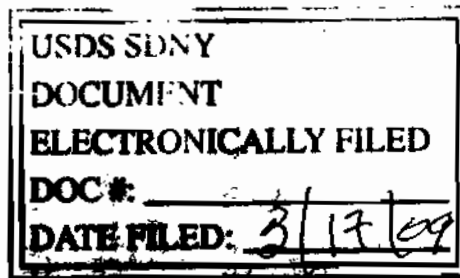
- v -

KELBY BATISTA,

Defendant.

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NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE



MEMORANDUM AND ORDER

01 CR 823 (NRB)


The defendant has filed for appointment of counsel to assist him in filing a motion for reduction of sentence under the November 1, 2007 amendment to the U.S. Sentencing Guidelines Manual that retroactively lowered the guideline sentencing range for certain categories of offenses involving crack cocaine. Batista plead guilty to a narcotics conspiracy to distribute and possess with intent to distribute cocaine in the form of crack in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(a). He was sentenced on June 3, 2002 to 135 months.

Defendant's application for appointment of counsel is denied. Under the leading case of Cooper v. A. Sargenti Co., Inc., 877 F.2d 170, 172 (2d Cir. 1989), the merit of a party's claim is a central determination to appoint counsel. Here Batista's claim is lacking in merit. Given that the amount of

crack cocaine at issue here exceeds 4.5 kilograms (see Presentence Investigation Report at 4-5 and Sentencing Transcript at 3-4), the amendment to 1B1.10 does not apply and the correct base offense level remains 38. See Amendment 706 to the U.S. Sentencing Guidelines ("Section 2D.1(c)(1) is amended by striking '1.5 KG or more of Cocaine Base' and inserting '4.5 KG or more of Cocaine Base'."). Simply stated, the amendment did not reduce the penalties for anyone who trafficked in excess of 4.5 kilograms of crack cocaine. We note that the Probation Office reached this same conclusion.

Defendant's motion for appointment of counsel to assist him in a motion to modify his sentence is therefore **DENIED**.

Dated: New York, New York  
March 16, 2009

  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

A copy of the foregoing Order has been mailed on this date to the following:

Kelby Batista  
#45379-054  
MDC Brooklyn  
P.O. Box 329001  
Brooklyn, NY 11232